Supreme Court, U.S.
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No. 95-1460

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Appellant,

v.

DAVIDA JOHNSON, *et al.*,
Appellees.

On Appeal from the United States District Court for the Southern District of Georgia

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BRIEF AMICUS CURIAE OF THE GEORGIA ASSOCIATION OF BLACK ELECTED OFFICIALS IN SUPPORT OF APPELLANT

J. GERALD HEBERT *
800 Parkway Terrace
Alexandria, VA 22302
(703) 684-3585
Counsel for Amicus Curiae
* Counsel of Record

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BRIEF AMICUS CURIAE OF THE GEORGIA ASSOCIATION OF BLACK ELECTED OFFICIALS IN SUPPORT OF APPELLANT

INTEREST OF AMICUS CURIAE

The Georgia Association of Black Elected Officials ("GABEO") is an organization of more than 700 African-Americans elected to public office in Georgia.[1] Its members include three United States Representatives and forty-two state legislators, as well as hundreds of county and municipal officials. *Amicus* GABEO and its members have a direct interest in the legal standards that will govern federal district courts in the remedial phase of cases under *Shaw v. Reno*, 113 S. Ct. 2816 (1993), and *Miller v. Johnson*, 115 S. Ct. 2475 (1995). If remedial courts are allowed to exercise unfettered discretion, *amicus* fears that the power to draw congressional and legislative districts will shift dramatically away from the States, and partisan and factional interests of every stripe will seek to attain in federal court the political victories they were unable to win in their state legislatures or at the polls.

INTRODUCTION AND SUMMARY OF ARGUMENT

In a long line of cases culminating in *White v. Weiser*, 412 U.S. 783 (1973), and *Upham v. Seamon*, 456 U.S. 37 (1982), this Court has established principles and procedures to constrain the discretion of federal courts at the remedial phase of redistricting litigation. The *Upham-Weiser* procedure gives the state legislature broad latitude to cure a judicially established violation. But if the State fails to produce a legal redistricting plan, the federal court, in fashioning a remedy, must begin with the State's *invalid* plan and may alter *only* those aspects of it that

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[1] Letters of consent to the filing of this brief by all parties have been filed with the Clerk.

the court has specifically found to be unconstitutional or illegal. All other aspects of the State's plan must be left untouched, as they are presumed to reflect the legitimate policy choices of the State and its citizens. *See Upham*, 456 U.S. at 40-44 (*per curiam*) (summarily reversing three-judge District Court's remedial order); *Weiser*, 412 U.S. at 793-97.

The court below carved out an unprecedented and unwarranted exception to the *Upham-Weiser* standard. J.S. App. 2a-6a. The three-judge District Court had declared unconstitutional the Second and Eleventh Districts in Georgia's 1992 congressional plan and initially had indicated that, if the legislature failed to remedy the violations, the court would adopt a plan "as narrowly conceived as possible to satisfy constitutional requirements and [to] cause minimal disruptions to the political processes of the State of Georgia." Order, Aug. 2, 1995; *accord Johnson v. Miller*, 864 F. Supp. 1354, 1393 (S.D. Ga. 1994) (*per curiam*), *aff'd*, 115 S. Ct. 2475 (1995). However, when the legislature failed to enact a substitute plan, the District Court (with one judge dissenting) reversed course and held that the State's 1992 plan could *not* form the basis for a proper remedy because it "more closely reflect[ed]" the intentions of the United States Department of Justice than those of the Georgia General Assembly. J.S. App. 5a; *see id.* at 4a-6a, 12a; *see also id.* at 13a & n.9 (also refusing to base its remedy on the State's *1991* plan, even though the General Assembly enacted that plan *before* the Justice Department became involved in Georgia's redistricting process).

Having freed itself from the constraints that *Upham* and *Weiser* normally impose on a federal remedial court, the two-judge majority proceeded to redraw all eleven of Georgia's congressional districts, to pit two pairs of incumbents against each other (thus creating two open seats), and to move a fifth incumbent to a new district. In doing so, the District Court ran roughshod over the specific criteria the General Assembly had enunciated in its 1991 redistricting guidelines and had embodied in its

1991 and 1992 congressional maps. J.S. App. 1a-29a (remedial order and opinion), 41a-43a (court-imposed plan); *see id.* at 6a (conceding that changes to the 1992 map are "drastic"); *see also Miller*, 115 S. Ct. at 2483 (citing General Assembly's express criteria, including "preserving the core[s] of existing districts" and "avoiding contests between incumbents").

The District Court failed to grasp the relevance of the key analytical distinction between vote-dilution and *Shaw* claims. A vote-dilution claim seeks to correct an imbalance in political and electoral opportunity. By necessity, a remedy that fully cures that imbalance and offers equal opportunity for all voters will probably alter the results of the next election. A *Shaw* claim focuses upon an entirely different problem—the classification and separation of voters on the basis of race. A remedy that fully cures a *Shaw* violation, therefore, need not have *any* effect on electoral outcomes. Indeed, a federal remedial court in a *Shaw* case abuses its equitable discretion if it goes out of its way to redistribute political power by dramatically enhancing the voting strength of some groups at the expense of others, forcing particular incumbents to run against each other, and effectively "picking winners and losers." The court below committed precisely that error.

If this Court affirms the judgment below, the *Upham-Weiser* constraints on federal remedial courts will prove largely meaningless in *Shaw* cases. Wherever the Justice Department, acting pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, is said to have "tainted" or "subvert[ed]" the districting process, J.S. App. 4a-5a, 12a, federal remedial courts will be free to shunt aside legitimate state policy decisions and to redraw districts any way they see fit. Thus, *Shaw* litigation will give rise to a new and extraordinarily lenient remedial standard which will invite all manner of partisan and factional interests to seek from the federal courts those political victories that they were unable to win in the halls of

their state legislatures or at the polls. This enlargement of the federal judicial role is unwarranted, and should not stand. This Court should act now by summarily reversing the District Court's judgment and ordering prompt imposition of an appropriate remedial plan.

ARGUMENT

This Court has repeatedly stated that *Shaw* claims are "analytically distinct" from vote-dilution claims, *Shaw*, 113 S. Ct. at 2830; *Miller*, 115 S. Ct. at 2485, but has had no occasion to explain how that distinction should affect a federal district court's remedial actions in a *Shaw* case. In the last four months, three-judge courts in Georgia and Louisiana have—in rather different ways—turned their backs on the remedial procedure established by this Court in *Upham* and *Weiser*.[2] This case provides a clean vehicle for reaffirming *Upham* and *Weiser* and explaining their relevance to *Shaw* cases.

I. UNDER *UPHAM* AND *WEISER*, FEDERAL COURTS REMEDYING UNCONSTITUTIONAL DISTRICTING PLANS MUST DEFER TO THE STATE, AND MAY DO *ONLY* WHAT IS NECESSARY TO REDRESS THE PARTICULAR INJURIES CAUSED BY THE CONSTITUTIONAL VIOLATION.

The Constitution allocates to the States the primary responsibility for reapportionment. U.S. Const., art. I, § 2; *see Growe v. Emison*, 507 U.S. 25, 34 (1993). Since its decision in *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court has consistently recognized that "reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in

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[2] In *Hays v. Louisiana*, Nos. 92-1522, 95-1241, slip op. at 1-2, 24-27 (W.D. La. Jan. 5, 1996) (*per curiam*), the three-judge District Court expressly *refused* to give the state legislature any opportunity to redraw its districting plan.

a timely fashion after having had an adequate opportunity to do so." Id. at 586.[3]

This Court has established a standard procedure to constrain the remedial discretion of federal courts that have invalidated districting plans. *Upham*, 456 U.S. at 40-44; *Weiser*, 412 U.S. at 793-97. After a district court declares a plan invalid, its first step ordinarily is to give the State a reasonable opportunity to draw a substitute. *Weiser*, 412 U.S. at 794-95. As Justice Powell explained, a plan enacted by the legislature is "likely to reflect a State's political policy and the will of its people more accurately than a decision by unelected federal judges." *Connor v. Finch*, 431 U.S. 407, 431 (1977) (dissenting opinion) (citing *Chapman v. Meier*, 420 U.S. 1 (1975)).[4]

If the State enacts no substitute plan, or if the plan it enacts is itself invalid, the court's second step is to request that the parties and *amici* submit proposed re-

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[3] *See Burns v. Richardson*, 384 U.S. 73, 84-85 (1966); *Ely v. Klahr*, 403 U.S. 108, 114 & n.6 (1971); *Connor v. Williams*, 404 U.S. 549, 552 n.4 (1972); *Sixty-seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 196 (1972) (*per curiam*); *Weiser*, 412 U.S. at 794-95; *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978) (plurality opinion); *McDaniel v. Sanchez*, 452 U.S. 130, 138, 150 n.30 (1981); *Upham*, 456 U.S. at 41-42; *Growe*, 507 U.S. at 34; *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993); *see also Miller*, 115 S. Ct. at 2488; *id.* at 2500 (Ginsburg, J., dissenting) (Both the majority and the dissenters "agree that federalism and the slim judicial competence to draw district lines weigh heavily against judicial intervention in apportionment decisions; as a rule, the task should remain within the domain of state legislatures.").

[4] In attempting to remedy its previous constitutional violation, the legislature has very broad discretion and is free to reconsider its goals and policies. For example, a legislature certainly could decide that it no longer wanted to preserve the cores of existing districts or to avoid contests between incumbents. *See Burns*, 384 U.S. at 83-85, 89 n.16. So long as the State enacts a new plan that remedies the violation and complies with the applicable federal and state constitutional and statutory provisions, it will become the governing law. *Wise*, 437 U.S. at 540 (plurality opinion); *Weiser*, 412 U.S. at 795; *Burns*, 384 U.S. at 85.

medial plans. *See, e.g., Upham*, 456 U.S. at 38. The present case involves no dispute as to these first two steps.

The third step—which *is* at issue here—is for the court either to choose among the litigants' proposed plans or to draw its own remedial map (often with the help of a special master). But the district court's discretion at this third step is far more constrained than is the legislature's at the first step. *See Voinovich v. Quilter*, 507 U.S. 146, 156-57 (1993); *see also Connor v. Finch*, 431 U.S. at 415 ("[The task of] a federal court . . . left with the unwelcome obligation of performing in the legislature's stead, while lacking the [legislature's] political authoritativeness, . . . is inevitably an exposed and sensitive one that must be accomplished circumspectly, and in a manner 'free from any taint of arbitrariness or discrimination.'") (quoting *Roman v. Sincock*, 377 U.S. 695, 710 (1964)); *cf. Davis v. Bandemer*, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring in judgment) ("Federal courts [should not] attempt to recreate the complex process of legislative apportionment in the context of adversary litigation in order to reconcile the competing claims of political, religious, ethnic, racial, occupational, and socioeconomic groups."). A federal "court seeking to remedy an unconstitutional apportionment [must] right the constitutional wrong while minimizing disturbance of legitimate state policies." *Sixty-seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 202 (1972) (Stewart, J., dissenting).

In essence, the remedial court must differentiate those aspects of the State's plan that are unconstitutional from those that reflect the State's legitimate political policies, and then eliminate the former while minimizing interference with the latter. *See Upham*, 456 U.S. at 43 ("An appropriate reconciliation of [the requirements of the Constitution with the goals of state political policy] can only be reached if the district court's modifications of a state plan are limited to those necessary to cure any constitu-

tional or statutory defect."); *Weiser*, 412 U.S. at 795 ("In fashioning a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary.'") (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971)).

In devising a narrowly tailored remedy—making *only* those changes "*necessary* to cure [the] . . . defect," *Upham*, 456 U.S. at 43 (emphasis added)—courts focus upon the concrete, particularized "injury in fact" caused by the invalid districting plan.[5] In a vote-dilution case, voters who belong to a particular group claim to have been illegally disadvantaged by a districting plan. Their injury is, simply put, that the "wrong" representative was elected because the plan improperly enhanced the political strength of one identifiable group of voters, at the expense of some other group to which the plaintiffs belong. *Cf. United States v. Saylor*, 322 U.S. 385, 386, 389 (1944) (right to vote protects against the diluting effect of ballot-box stuffing). For example, if voting is racially polarized and members of a sizable, predominantly black community have been fragmented and dispersed among several districts, the preferences and interests of whites will be systematically overrepresented, at the expense of blacks. *See White v. Regester*, 412 U.S. 755, 765-70 (1973); *see also Voinovich*, 507 U.S. at 154-55 (minority vote-dilution claims focus "exclusively on the consequences"

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[5] "[T]he nature of the . . . remedy is to be determined by the nature and scope of the constitutional violation. . . . The remedy must therefore be related to the *condition* alleged to offend the Constitution . . . ." *Missouri v. Jenkins*, 115 S. Ct. 2038, 2049 (1995) (citations and internal quotation marks omitted); *see Rogers v. Lodge*, 458 U.S. 613, 628 (1982); *see also Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 419-20 (1977); *Milliken v. Bradley*, 433 U.S. 267, 280-82 (1977); *Rizzo v. Goode*, 423 U.S. 362, 378-80 (1976); *Milliken v. Bradley*, 418 U.S. 717, 738, 744 (1974); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971).

of redistricting and on "electoral outcomes"); *Growe*, 507 U.S. at 40-41 (minority vote-dilution plaintiffs must prove their group has the potential to elect its preferred representative in a new, remedial district but is unable to do so under the challenged districting plan); *Thornburg v. Gingles*, 478 U.S. 30, 93 (1986) (O'Connor, J., concurring in judgment) ("electoral success" is "the linchpin of vote dilution claims").

Any cure that adequately reflects different groups' undiluted voting strength—*e.g.*, uniting a previously fragmented black community within a single district—will likely alter the *outcome* of the next election. The federal court's remedy literally may result in the retirement or defeat of a particular incumbent and the election of a new candidate preferred by those minority voters whose political strength the previous plan diluted. Indeed, that is the very point of the litigation: to change the composition of the relevant governing body by altering electoral results. As Point II explains, *Shaw* claims are entirely different, because they simply do not address electoral *outcomes*.

II. IN REMEDYING REDISTRICTING PLANS THAT UNCONSTITUTIONALLY CLASSIFY AND SEPARATE VOTERS ON THE BASIS OF RACE, A FEDERAL COURT MUST REDRAW LINES PREDOMINANTLY USING TRADITIONAL NON-RACIAL DISTRICTING CRITERIA AND MUST AVOID UNNECESSARILY REDISTRIBUTING POLITICAL POWER AND ALTERING LIKELY ELECTORAL OUTCOMES.

Shaw claims are not reverse discrimination claims. Here, for example, plaintiff-appellees do not argue that Georgia's 1992 plan minimized or diluted the voting strength of whites or of any other racial group. Nor could they. Whites constitute 71% of the State's total population and effectively control 73% of its congressional seats. *See Shaw*, 113 S. Ct. at 2824; *see also Johnson*

v. DeGrandy, 114 S. Ct. 2647, 2664 (1994) (O'Connor, J., concurring).

Rather, the claim here is that the State injured voters when it disregarded its traditional districting criteria and instead used race as the predominant motivating factor in drawing district lines. Specifically, the District Court found that Georgia had drawn the boundaries of its Eleventh and Second Congressional Districts so that blacks fell on one side of the lines and whites on the other—rather than following preexisting lines that define recognizable geographic or territorial units, such as counties, municipalities, townships, communities, neighborhoods, census tracts, precincts, media markets, or natural (or man-made) geographic regions.[6] The plaintiffs in a typical *Shaw* case allege that the State's race-based line-drawing —intentionally placing black voters in one district and white voters in a separate district—creates an *implied* racial classification which (like an express racial classification) stigmatizes persons on the basis of their race and therefore is presumptively unconstitutional. *See Shaw*, 113 S. Ct. at 2824-28. Any stigmatic harm proven in a *Shaw* case flows from this implied racial classification—not from the districting plan's effects on electoral outcomes.

The cure for a *Shaw* violation is to "fix" the unconstitutional district's boundary, so that it is not excessively based on race in substantial disregard of traditional districting criteria (such as respect for the preexisting borders of counties, municipalities, communities of interest, or other recognizable geographic units). *See Miller*, 115 S. Ct. at 2488; *id.* at 2497 (O'Connor, J., concurring); *cf. Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420 (1977). Such a narrowly tailored cure would remedy the

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[6] *See* Bernard Grofman, Shaw v. Reno *and the Future of Voting Rights*, PS: Political Science & Politics, Mar. 1995, at 27, 30-31 (legislators should be able to explain to their constituents the boundaries of their districts in simple, commonsense terms, based on recognizable geographic referents).

"stigmatic harm" caused by the racial classification: once the remedy is implemented, voters' placement within or without a particular district would be explained by their residence in a particular county (or municipality or community) rather than by the State's unconstitutional use of race. *See United States v. Hays*, 115 S. Ct. 2431, 2433, 2436-37 (1995); *Shaw*, 113 S. Ct. at 2824, 2832.[7]

The process of redrawing an unconstitutional majority-minority district will usually reduce the district's minority population and increase its white population. Often, the district will be transformed into a "majority-white" district, albeit one with a sizable minority population.[8] Sometimes, the reduction in the minority group's percentage of the electorate will be so great that the minority-preferred incumbent will retain no realistic potential for reelection. Where such a result is unavoidable, the court may have no choice.

But in many other cases, such as this one, the district court will be faced with two or more proposed remedies

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[7] Given the strict "one person, one vote" requirement mandated by Article I, Section 2 of the Constitution, *see Karcher v. Daggett*, 462 U.S. 725, 730-44 (1983), it is impossible for the *entire* boundary of each congressional district to follow preexisting lines. *See Connor v. Finch*, 431 U.S. at 419; *id.* at 429 (Blackmun, J., concurring in judgment). But a district is presumptively unconstitutional if the State (or federal remedial court) relied on race *in substantial disregard* of traditional districting principles when placing "a *significant number* of voters within or without [that] particular district." *Miller*, 115 S. Ct. at 2488 (emphasis added); *see id.* at 2497 (O'Connor, J., concurring) (reliance on race "in substantial disregard" of traditional districting principles triggers strict scrutiny).

[8] The creation of such a district, where the number of white voters equals or narrowly exceeds the number of black voters, will redress the "representational harms" this Court warned against in *Shaw*, 113 S. Ct. at 2827, and *Hays*, 115 S. Ct. at 2436. *See also Miller*, 115 S. Ct. at 2485; *Shaw*, 113 S. Ct. at 2828. Absent severe racial polarization, in a district with roughly equal numbers of white voters and black voters, no elected official could survive by appealing solely to members of one racial group.

(either submitted by the litigants, or drawn by the court or its special master), each of which draws district lines without excessively relying on race and largely adheres to the State's traditional districting principles. Faced with such a choice, the court must minimize its intrusion into the State's political processes by rejecting the plans that would be most disruptive to electoral outcomes. In the *Shaw* context, unlike the vote-dilution context, the harm has nothing to do with electoral results, and therefore any *unnecessary* interference with those results would constitute a clear abuse of the federal court's equitable discretion.

III. THE GEORGIA DISTRICT COURT ABUSED ITS DISCRETION BY UNNECESSARILY INJECTING ITSELF INTO THE STATE'S POLITICAL PROCESSES, OVERTURNING THE STATE'S SPECIFIC DISTRICTING POLICIES, AND SELECTING A PLAN THAT IS LIKELY TO WREAK HAVOC ON GEORGIA'S CONGRESSIONAL DELEGATION, WHEN IT COULD HAVE CURED THE VIOLATION WHILE RESPECTING STATE POLITICAL POLICIES AND MINIMALLY AFFECTING LIKELY ELECTORAL OUTCOMES.

The District Court rejected several proper remedial plans submitted by defendant-intervenors and their *amici*, and instead reached out to create a new map, from scratch, that largely ignored the State's districting criteria and could unnecessarily wreak havoc on the composition of Georgia's congressional delegation.

A. Illustrative Plan "GA-PLAN-A" Is Constitutional.

One of the remedial plans before the District Court was "GA-PLAN-A," the "Illustrative Plan" submitted by defendant-intervenor the United States. J.S. App. 44a (map). GA-PLAN-A's congressional districts are contiguous, geometrically and functionally compact, and respectful of political subdivisions and of communities

defined by actual shared interests, including those "communities that have a particular racial makeup." *Miller*, 115 S. Ct. at 2488, 2490. The court conceded that GA-PLAN-A contains a lower overall population deviation (0.19%) than the court-imposed plan (0.35%).[9] J.S. App. 6a-8a; *see Weiser*, 412 U.S. at 786-88, 796-97 (reversing district court order rejecting the proposed remedial plan with the lowest population deviation); *Daggett v. Kimmelman*, 580 F. Supp. 1259, 1264-65 (D.N.J.) (three-judge court) (adopting the proposed remedial plan with the lowest population deviation, even though it split two municipalities), *summarily aff'd sub nom. Karcher v. Daggett*, 467 U.S. 1222 (1984).

But the court rejected GA-PLAN-A and called it "constitutionally defective" *solely* on the ground that it "split *numerous* counties outside of the metropolitan Atlanta area, apparently for racial reasons." J.S. App. 8a & n.4 (emphasis added). The District Court's characterization of GA-PLAN-A is blatantly incorrect. In fact, it splits only *two* of the 139 counties outside the metropolitan Atlanta area, *see* J.S. App. 44a, and primarily for equal-population and other non-race-based reasons.[10] If merely

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[9] Five of the districts in the court-imposed plan—but *none* in GA-PLAN-A—deviate more than 0.10% from the ideal district population. *Compare* J.S. App. 43a *with id.* at 45a.

[10] GA-PLAN-A splits Bibb and Muscogee Counties, which are two of the four most heavily and densely populated Georgia counties outside the metropolitan Atlanta area. In Bibb County, GA-PLAN-A's district lines are neither bizarre nor irregular, and its Eleventh District does not split any census tracts. *Cf. DeWitt v. Wilson*, 856 F. Supp. 1409, 1411, 1413-15 (E.D. Cal. 1994) (three-judge court) (upholding California's congressional districts against a *Shaw* challenge in part because they were built with undivided census tracts), *summarily aff'd in relevant part*, 115 S. Ct. 2637 (1995). And splitting Muscogee County is necessary to keep intact the Army's Fort Benning, which lies on both sides of the Muscogee-Chattahoochee County border. By contrast, the District Court's blind allegiance to county boundaries led it to bisect Fort Benning—the State's largest military base and far and away the largest employer in the region.

splitting those two counties renders GA-PLAN-A "constitutionally defective" under *Shaw* and *Miller*, then application of the *Miller* Court's standard surely *will* "throw into doubt" dozens of the Nation's 435 congressional districts. *Miller*, 115 S. Ct. at 2497 (O'Connor, J., concurring); *see id.* (*Shaw* subjects only "extreme instances of gerrymandering" to strict scrutiny). Because none of the districts in GA-PLAN-A can trigger strict scrutiny under *Shaw* or *Miller*, as properly understood, that plan would redress the constitutional infirmities in Georgia's congressional map no less than the court-imposed scheme.

B. The District Court Abused Its Discretion.

In choosing between GA-PLAN-A and its own plan, then, the court should have considered only two questions. *First*, which plan is more faithful to the legitimate districting criteria enunciated in the General Assembly's 1991 guidelines and embodied in the State's now-invalidated plan? *Second*, which plan is less disruptive to the likely outcomes of Georgia's 1996 congressional elections? On both points, GA-PLAN-A is demonstrably superior to the court-imposed scheme, and the District Court therefore abused its discretion when it selected the latter over the former.

GA-PLAN-A represents a "judicious and proper balancing" of the General Assembly's districting criteria. *DeWitt v. Wilson*, 856 F. Supp. 1409, 1413 (E.D. Cal. 1994) (three-judge court), *summarily aff'd in relevant part*, 115 S. Ct. 2637 (1995). It fairly and legally reflects the voting strength of Georgia's minority citizens and of its white citizens, it preserves the cores of all eleven districts, it avoids unnecessary contests between incumbents, *Miller*, 115 S. Ct. at 2483 (reciting the General Assembly's 1991 redistricting guidelines), and it would not massively disrupt Georgia's congressional election results.

GA-PLAN-A leaves the homes of each of the eleven Representatives in a separate district, thus avoiding un-

necessary contests between incumbents, and provides each of the incumbents at least some realistic opportunity to compete for reelection.[11] With respect to the two districts declared unconstitutional, GA-PLAN-A redraws those districts such that white voters outnumber black voters in both new districts.[12] But, in the newly configured districts, both incumbents (Representatives McKinney and Bishop) would stand at least a fighting chance of reelection because they have the advantage of incumbency,[13] that advantage would not be offset by

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[11] Specifically, the Eleventh District's Congresswoman, Cynthia A. McKinney, an African-American Democrat, could run for reelection in a newly configured Eleventh District that contains the core of her old Eleventh, a 51.0% black voting-age population, and the home of no other incumbent Member of Congress. The Second District's Congressman, Sanford D. Bishop, Jr., also an African-American Democrat, could run for reelection in a newly configured Second District that contains the core of his old Second and a 42.0% black voting-age population, and that also contains the home of no other incumbent.

[12] GA-PLAN-A's Eleventh and Second Districts would likely contain a significantly greater number of white voters than black voters because in Georgia, as in most of the South, whites register and turn out at a higher rate than blacks. As of 1990, blacks constituted about 25% of Georgia's voting-age population, but only 22% of its registered voters and less than 21% of its actual electorate. *See* U.S. Dep't of Commerce, Bureau of the Census, *Voting and Registration in the Election of November 1988*, Ser. P-20, no. 440 (1989); *Congressional Districts in the 1990s* 827 (1993); *Quiet Revolution in the South* 102 (Chandler Davidson & Bernard Grofman eds., 1994); *see also Johnson*, 864 F. Supp. at 1392 (blacks are 60.4% of the voting-age population but only 57% of the registered voters in Georgia's Eleventh District); Mark Sherman, *State Redistricting*, Atlanta J. & Const., July 16, 1995, at 2G (blacks are 52.3% of the voting-age population but only 45% of the registered voters in the Second District).

[13] Political scientists estimate that the incumbency advantage, over the last few decades, has varied between 6 and 12 percentage points. *See, e.g.*, Gary King & Andrew Gelman, *Systemic Consequences of Incumbency Advantage in U.S. House Elections*, 35 Am. J. Pol. Sci. 110, 112-16 (1991).

having to run against another incumbent, and most of the voters in the new districts would already be familiar with (and represented by) Representative McKinney or Bishop. And there is no doubt that the other nine incumbents, each of whom could run in a largely familiar district, without facing another incumbent, and without having to move his home, would not be greatly damaged or aided by GA-PLAN-A.

By contrast, the court-imposed plan—supposedly designed to remedy a constitutional violation that does *not* focus on electoral outcomes [14]—ignored the State's legitimate political policies and could needlessly wreak havoc on the composition of its congressional delegation. Although Georgia had not placed two Members of Congress in the same district since 1931 (when federal census results shrunk Georgia's congressional delegation from twelve to ten and thereby forced the pairing of incumbents), the court below dismissed Georgia's policy of "avoiding contests between incumbents," *Miller*, 115 S. Ct. at 2483, as "inherently [too] political" and "not [a] predominant factor[] the state has considered in the past." J.S. App. 14a n.10, 18a. *Compare Karcher v. Daggett*, 462 U.S. 725, 740 (1983) ("avoiding contests between incumbent Representatives" is a legitimate state objective). The court then went on to place four incumbents in two districts, thereby unnecessarily creating two open seats.

The District Court claimed that, by basing ten of its districts on Georgia's *1982* plan, J.S. App. 10a, 13a-14a, 17a-18a, it was being faithful to the State's announced policy of "preserving the core[s] of *existing* districts," *Miller*, 115 S. Ct. at 2483 (emphasis added). As this Court explained in *Weiser*, however, that particular policy is "aimed at maintaining existing relationships between

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[14] Although plaintiff-appellee George L. DeLoach is the white Democrat who McKinney narrowly defeated in the 1992 runoff election, he brought the present action in his capacity as a voter, not as a failed candidate for Congress.

incumbent congressmen and their constituents and preserving the seniority the members of the State's delegation have achieved in the United States House of Representatives." 412 U.S. at 791. The State's policy aims could hardly be furthered by a court-imposed scheme that defers to a plan from the *1980s* and places in jeopardy the seats of nearly half the members of Georgia's *present* congressional delegation.

Two of the Members of Congress placed in districts with other incumbents are Representatives McKinney and Bishop. When they first ran for Congress in 1992, their victories in the Democratic runoff elections were narrow, as their white opponents received overwhelming support from voters in heavily white precincts. *See* U.S. Exh. 24, tables 3, 4, 10. In 1994, both were renominated without a runoff. In the 1994 general elections, Congresswoman McKinney and Congressman Bishop garnered 65.6% and 66.2% of the vote, respectively, even though the voting-age populations of their districts were only 60.4% and 52.3% black, respectively. Philip D. Duncan & Christine C. Lawrence, *Congressional Quarterly's Politics in America* 344, 365 (1995); *Congressional Districts in the 1990s* 203 (1993).[15] Their success was doubtless attributable both to the advantages of incumbency *and* to the lessening of racial polarization, as once-reluctant white voters saw—for the first time—that their interests could be vigorously represented in Washington by African-American Members of Congress. Thus, it is clear that in 1996 Congresswoman McKinney and Congressman Bishop—with two more years of seniority and public service behind them, and with their proven willingness "to pull, haul, and trade to find common political ground," *DeGrandy*, 114 S. Ct. at 2661—could potentially be elected by the narrowly majority-*white* electorates

[15] Atlanta's fifth-term Congressman, John Lewis, received 69.1% of the vote in a district whose voting-age population was only 57.5% black. Duncan & Lawrence, at 351; *Congressional Districts in the 1990s*, at 203.

in the reconfigured Eleventh and Second Districts of GA-PLAN-A.[16]

The court-imposed plan, however, places Congresswoman McKinney and Congressman Bishop in districts whose voting-age populations are only 32.8% and 22.5% black, respectively.[17] No African-American has *ever* been elected in Georgia for Congressman, State Senator, or State Representative from any district with such a low black percentage. *See* Joint Center for Political and Economic Studies, *National Roster of Black Elected Officials* (1995). And no African-American has *ever* been elected to Congress from such a district in *any* of the eleven former States of the Confederacy. *See American Leaders 1789-1991* (Colleen McGuiness ed., 1991); Duncan & Lawrence *passim*. Breaking these unfortunate precedents will be particularly difficult for a candidate who must hurdle the twin obstacles of a majority-vote

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[16] *Amicus* is not arguing here for the creation of so-called "influence districts" in which minority voters are sufficiently numerous to *influence*, but not alter, election results. *See Growe*, 507 U.S. at 41 n.5; *cf.* J.S. App. 23a-24a. Rather, *amicus* is simply pointing out the empirical fact that, although Georgia's racial cleavages often "necessitate majority-minority districts to ensure equal political and electoral opportunity," in GA-PLAN-A's Eleventh and Second Congressional Districts—where white voters would constitute a narrow majority of the electorate—African-American citizens *might* be "able to form coalitions with [white] voters . . . to elect candidates of their choice," particularly when those candidates are incumbent Members of Congress who have consistently striven to represent *all* of their constituents regardless of race. *DeGrandy*, 114 S. Ct. at 2661. As Justice Kennedy noted in *DeGrandy*, "[t]he assumption that majority-minority districts elect *only* minority representatives, or that majority-white districts elect *only* white representatives, is false as an empirical matter." *Id.* at 2665 (concurring opinion) (emphases added).

[17] The District Court credited expert statistical testimony showing that a district with no incumbent will elect a black candidate if its population of registered voters is 55% black, but will elect a white candidate if that figure falls to 50% or less. *See* J.S. App. 25a-26a; *cf.* J.S. 18-22.

runoff requirement for the Democratic nomination, Ga. Code Ann. § 21-2-501, followed by a general election campaign against a Republican *incumbent* Member of Congress.

Appellees may argue that Congresswoman McKinney and Congressman Bishop somehow "deserve" this fate because their incumbencies are "tainted" by the constitutional error that the Justice Department forced upon Georgia's General Assembly. *See* J.S. App. 4a. That argument, however, ignores the facts. At any time in the year and a half since the court below struck down Congresswoman McKinney's district, the Georgia General Assembly could have mooted this case by redrawing the State's congressional map, adopting any legal configuration it desired. It consistently refused to do so, even when the District Court indicated that, if the legislature failed to act, it would adopt a "narrowly conceived" plan with "minimal disruptions to the political processes of the State of Georgia." Order, Aug. 2, 1995; *accord Johnson*, 864 F. Supp. at 1393. By repeatedly declining to adopt *any* substitute plan, much less one resembling the plan imposed by the court below, the State of Georgia has demonstrated its unwillingness to undermine Congresswoman McKinney, Congressman Bishop, or the constituents—black and white—who they so ably represent.

Georgia's three African-American Representatives have begun attaining considerable seniority in the House,[18] and their service to the State of Georgia and its citizenry has earned each of them the electoral support of a strong majority of black voters and of a significant and growing minority of white voters within their current districts. Indeed, their performance as public servants has challenged racial stereotypes held by whites and blacks alike, and has even begun to reverse the racial polarization that

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[18] In Georgia's House delegation, Congressman Lewis is the second most senior member (behind Speaker Newt Gingrich), and Congresswoman McKinney and Congressman Bishop are tied for third.

has marred politics in the State of Georgia for more than two centuries. Their efforts to "carry us [toward] the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire," *Shaw*, 113 S. Ct. at 2832—must not be jeopardized by an overzealous federal district court that got itself needlessly entangled in the "political thicket." *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (opinion of Frankfurter, J.).

IV. AFFIRMANCE OF THE DECISION BELOW WILL CONVERT *SHAW* LITIGATION INTO A POWERFUL WEAPON FOR PARTISAN AND FACTIONAL INTERESTS THAT SEEK TO WIN IN FEDERAL COURT THE POLITICAL VICTORIES THEY WERE UNABLE TO ATTAIN IN THEIR STATE LEGISLATURES OR AT THE POLLS.

Unbridled discretion on the part of *Shaw* remedial courts will invite manipulation by partisan and factional interests. Because it is exceedingly difficult to attack a redistricting scheme on *non*-racial grounds, *see, e.g., Davis v. Bandemer*, 478 U.S. at 132-33, 139 (plurality opinion); *Badham v. Eu*, 694 F. Supp. 664, 667-72 (N.D. Cal. 1988) (three-judge court), *summarily aff'd*, 488 U.S. 1024 (1989), political parties, factions, and interest groups have an incentive to couch their grievances in racial terms.[19] Absent strict limits on remedial discretion in *Shaw* cases, partisan manipulators surely will seize the opportunity to gain from federal courts what they were unable to gain through the State's normal political processes. With ongoing *Shaw* cases attacking congressional

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[19] *See* Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 Sup. Ct. Rev. 245, 251; *see also* Charles Fried, *The Supreme Court, 1994 Term—Foreword: Revolutions?*, 109 Harv. L. Rev. 13, 66 n.355 (1995); Richard H. Pildes, *The Politics of Race*, 108 Harv. L. Rev. 1359, 1378-90 (1995) (book review).

districts not only in Georgia and Louisiana, but also in Florida, Illinois, New York, North Carolina, Texas, and Virginia, the impact of this Court's decision in this case will quickly be felt throughout the Nation. Unless this Court expressly requires adherence to the familiar principles of *Upham* and *Weiser*, the remedial phases of *Shaw* cases will become political free-for-alls, and a doctrine born of the desire to constrain the Federal Government's "shortsighted and unauthorized" intrusions into state politics, *Miller*, 115 S. Ct. at 2494, will instead have opened the way to the wholesale federalization of the redistricting process.

CONCLUSION

This Court should summarily reverse the judgment of the District Court and remand the case with instructions to implement promptly a remedial plan that is narrowly tailored to cure the constitutional violations found in the State's 1992 plan.

Respectfully submitted,

J. GERALD HEBERT *
800 Parkway Terrace
Alexandria, VA 22302
(703) 684-3585
Counsel for Amicus Curiae

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* Counsel of Record